

Planning Commission Date: June 13, 2007

Item No. 1

## MILPITAS PLANNING COMMISSION AGENDA REPORT

Category: Public Hearing

Report Prepared by: Felix Relilford  
City Attorney Office

Public Hearing: Yes: X No: \_\_\_\_\_

Notices Mailed On: N/A

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**TITLE:** CONSIDERATION OF ZONING ORDINANCE TEXT  
AMENDMENT NO. ZT2007-ADDING A CHAPTER 5 TO  
TITLE XI OF THE MILPITAS MUNICIPAL CODE  
ESTABLISHING A PROHIBITION ON THE  
ESTABLISHMENT AND OPERATION OF MEDICAL  
MARIJUANA DISPENSARIES

Permits: N/A

Location: Citywide

APN: N/A

**RECOMMENDATION:** Open the Public Hearing. Approve Zoning Ordinance Text  
Amendment No. ZT2007-3 Adding a New Chapter 5 to Title XI  
of the Milpitas Municipal Code Establishing a Prohibition on  
Establishments and Operation of Marijuana Dispensaries and  
Forward Recommendation to the City Council.

Applicant(s): City of Milpitas

Property Owner(s): N/A

Previous Action(s): City Council Moratorium

General Plan Designation: N/A

Present Zoning: N/A

Existing Land Use: N/A

Agenda Sent To: N/A

Attachments: Ordinance No. 270.2 and Zoning Ordinance Text Amendment No.  
ZT2007-3  
Memorandum-dated May 9, 2007

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**BACKGROUND:**

On August 2, 2005, following previous discussion of the issue during meetings of May 17 and June 7, 2005, the City Council, by a unanimous vote of 5-0, adopted urgency Ordinance number 270, establishing a 45-day moratorium on the establishment and operation of medical marijuana dispensaries. On September 6, 2005, the City Council, by a vote of 4 to 1, voted to extend the initial moratorium for a period of 22 months and 15 days as permitted under state law. State law permits such moratoriums as a vehicle for Cities to study potential zoning measures to protect public safety, health and welfare, but under California Government Code section 65858(f), the moratorium may be extended only once. The current moratorium will expire on July 23, 2007.

At the City Council meeting of May 15th, 2007 the City Council received a staff report from the City Attorney's office on behalf of Planning Staff, which detailed the various options available to the City upon expiration of the urgency ordinance, adopted August 2<sup>nd</sup>, 2005, that currently prohibits the establishment and operation of medical marijuana dispensaries within city limits. Following discussion of the staff presentation, the City Council gave direction, via unanimous vote, for staff to return with an ordinance prohibiting the establishment and operation of such facilities. This ordinance responds to that direction.

The attached ordinance would add a new Chapter 5 to Title XI of the Milpitas Municipal Code prohibiting the establishment and operation of medical marijuana dispensaries. The ordinance provides a broad definition of "medical marijuana dispensary" referencing applicable provisions of state law, but also includes a list of specified exceptions for certain health care facilities that would not be subject to the prohibition provided they are licensed pursuant to the California Health and Safety Code and otherwise comply with the Milpitas Municipal Code. The exceptions would apply to clinics, health care facilities, residential health care facilities for persons with chronic life-threatening illnesses, residential health care facilities for the elderly, and hospices or home health agencies, and are generally intended to allow for legitimate uses and prescription of medical marijuana under state law in state-licensed facilities that do not operate as medical marijuana dispensaries. The ordinance would prohibit medical marijuana dispensaries in all zoning districts, provide that any violation of the Chapter constitutes a misdemeanor, that anyone violating the chapter shall be guilty of a separate misdemeanor offense for each and every day of violation under the ordinance, and that violations shall constitute a nuisance subject to abatement and injunctive relief from the courts.

In order to comply with the moratorium deadline, on June 14, 2007, the City Council has set a special meeting at 5:30 p.m. to consider the Planning Commission recommendation regarding this matter. Included in the Commission's agenda packet are the proposed Ordinance No. 270.2 and Zoning Ordinance Text Amendment No. ZT2007-3.

**RECOMMENDATION:**

Open the Public Hearing. Approve Zoning Ordinance Text Amendment No. ZT2007

Adding a New Chapter 5 to Title XI of the Milpitas Municipal Code Establishing a Prohibition on Establishments and Operation of Marijuana Dispensaries and Forward Recommendation to the City Council.

**REGULAR**

NUMBER: 270.2

TITLE: **AN ORDINANCE OF THE CITY OF MILPITAS PROHIBITING THE ESTABLISHMENT AND OPERATION OF MEDICAL MARIJUANA DISPENSARIES**

HISTORY: This Ordinance was introduced (first reading) by the City Council at a Special meeting on \_\_\_\_\_, 2007, upon motion by Councilmember \_\_\_\_\_ and was adopted (Second reading) by the City Council at its regular meeting of \_\_\_\_\_, 2007 upon motion by Councilmember \_\_\_\_\_. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

\_\_\_\_\_  
Mary Lavelle, City Clerk

\_\_\_\_\_  
Jose Esteves, Mayor

APPROVED AS TO FORM:

\_\_\_\_\_  
Steven T. Mattas, City Attorney

ORDAINING CLAUSE:

THE CITY COUNCIL OF THE CITY OF MILPITAS DOES ORDAIN AS FOLLOWS:

SECTION 1. Recitals and Findings.

- A. In 1996, the voters of the State of California approved Proposition 215, which enacted the Compassionate Use Act of 1996, codified at California Health and Safety Code Section 11362.5. The Compassionate Use Act permits possession and cultivation of marijuana for medical purposes under limited and specified circumstances.
- B. In 2003, the State Legislature enacted Senate Bill 420, the Medical Marijuana Program, codified at California Health and Safety Code section 11362.7 *et seq.*, in order to clarify the scope of the Compassionate Use Act and to allow California cities and counties to adopt and enforce laws consistent with state law; and
- C. California Health and Safety Code section 11362.83 vests California cities with express authority to adopt and enforce laws consistent with the Compassionate Use Act and the Medical Marijuana Program; and
- D. The federal Controlled Substances Act, 21 U.S.C. Section 841 *et seq.*, makes it unlawful for any person to cultivate, manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense marijuana. The Controlled Substances Act contains no statutory exemption for the use of marijuana for medical purposes; and
- E. In 2001, the United States Supreme Court issued its decision in *United States v. Oakland Cannabis Buyer's Cooperative*, in which the Court held that there is no medical necessity defense or exemption for the possession of marijuana under the Federal Controlled Substances Act; and
- F. In 2005, the United States Supreme Court issued its decision in *Gonzalez v. Raich*, in which the Court held that Congress has authority under the Commerce Clause to prohibit the manufacture, cultivation, distribution and possession of marijuana pursuant to the Controlled Substances Act, even as such prohibitions apply to marijuana manufactured, cultivated, distributed or possessed within the State of California under the auspices of the Compassionate Use Act and the Medical Marijuana Program; and
- G. In light of these decisions and other unresolved tensions between state and federal law in the area, the City Council finds that it would be premature to permit the establishment and operation of medical marijuana dispensaries, as defined herein, within the City of Milpitas because to permit such activities could potentially subject the City and/or its officials to prosecution under federal law for aiding and abetting a violation of federal law; and
- H. On August 2, 2005, the City Council, under the authority of California Government Code section 65858, adopted an urgency ordinance establishing a 45-day moratorium on the establishment and operation of medical marijuana dispensaries, which moratorium was extended, as permitted under State law, by 22 months and 15 days on September 6, 2005. The current moratorium shall expire on July 23, 2007; and
- I. State law permits such moratoriums as a vehicle for cities to study potential zoning measures to protect public health, safety and welfare; and

- J. During the moratorium, City Planning staff, working in conjunction with the City Attorney's office, reviewed the ordinances and reported the regulatory experiences of several California cities with a long and documented history of public health and safety problems and adverse secondary effects associated with the operation of medical marijuana dispensaries; and
- K. Based on said documentation, investigation and reports compiled by City staff, the City Council hereby finds that the cultivation and distribution of medical marijuana through medical marijuana dispensaries contributes directly to undesirable secondary impacts on neighboring land uses, including but not limited to: excessive traffic and noise, attraction of criminality and criminal elements, trespass, disturbance calls, diversion of marijuana for illegitimate non-medical or recreational purposes, dependency, addiction and substance abuse, vehicular violations, burglary, theft, display and discharge of firearms, loitering, vagrancy, and on-site consumption of marijuana and marijuana-enhanced products; and
- L. The California Police Chiefs Association has compiled an extensive report detailing a number of the negative secondary effects associated with medical marijuana dispensaries. The City Council hereby finds that the report, contained online at [http://www.californiapolicechiefs.org/nav\\_files/research/pdfs\\_ord/el\\_cerrito\\_ord.pdf](http://www.californiapolicechiefs.org/nav_files/research/pdfs_ord/el_cerrito_ord.pdf), contains further persuasive anecdotal and documented evidence that medical marijuana dispensaries pose a threat to public health, safety and welfare; and
- M. California Health and Safety Code section 11362.5(c)(2) expressly provides that nothing in the Compassionate Use Act shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for non-medical purposes; and
- N. The City Council hereby finds that, because of the inconsistency between state and federal law relating to the possession and distribution, and because of the documented threat to public health, safety and welfare, it is in the best interest of the citizens of the City of Milpitas that the City prohibit the establishment and operation of medical marijuana dispensaries within the City of Milpitas; and
- O. Nothing in either the Compassionate Use Act or the Medical Marijuana Program contains an affirmative mandate that cities allow or permit medical marijuana dispensaries within their corporate limits; and
- P. This ordinance is enacted pursuant to California Health and Safety Code sections 11362.5(c)(2) and 11362.83 and the City's police power as granted broadly under Article XI, Section 7 of the California Constitution in order to promote the health, safety and welfare of Milpitas residents.

## SECTION 2.

A new Chapter V is hereby added to Title XI of the Milpitas Municipal Code to read as follows:

### **CHAPTER 5 MEDICAL MARIJUANA DISPENSARIES PROHIBITED**

## **XI-5-1.00 Definitions**

For the purposes of this Chapter, unless otherwise apparent from the context, the following definitions shall apply:

- A. "Medical Marijuana" is marijuana authorized in strict compliance with Health & Safety Code Section 11362.5 *et seq.*
- B. "Medical Marijuana Dispensary" means any facility or location, whether fixed or mobile, where a primary caregiver makes available, sells, transmits, gives or otherwise provides medical marijuana to two or more persons with identification cards or qualified patients, or any facility where qualified patients, persons with identification cards and primary caregivers meet or congregate collectively and cooperatively to cultivate or distribute marijuana for medical purposes under the purported authority of California Health and Safety Code section 11362.775.
  - a. Medical Marijuana Dispensary shall not include the following uses, so long as such uses comply with this Code, Health & Safety Code Section 11362.5 *et seq.*, and other applicable law:
    - 1. A clinic licensed pursuant to Chapter 1 of Division 2 of the Health & Safety Code.
    - 2. A health care facility licensed pursuant to Chapter 2 of Division 2 of the Health & Safety Code.
    - 3. A residential care facility for persons with chronic life-threatening illness licensed pursuant to Chapter 3.01 of Division 2 of the Health & Safety Code.
    - 4. A residential care facility for the elderly licensed pursuant to Chapter 3.2 of Division 2 of the Health & Safety Code.
    - 5. A hospice or a home health agency, licensed pursuant to Chapter 8 of Division 2 of the Health & Safety Code.
- C. "Person with an Identification Card" shall have the meaning given that term by Health & Safety Code Section 11362.7.
- D. "Primary Caregiver" shall have the meaning given that term by Health & Safety Code Section 11362.7.
- E. "Qualified Patient" shall have the meaning given that term by Health & Safety Code Section 11362.7.

## **XI-5-2.00 Operation of Medical Marijuana Dispensaries Prohibited**

Medical marijuana dispensaries, as defined in this chapter, are prohibited in all zones throughout the City of Milpitas.

**XI-5-3.00 Criminal Penalties**

Any violation of any provision of this chapter shall be deemed a misdemeanor.

**XI-5-4.00 Separate Offense for Each Day**

Any person who violates any provision of this chapter shall be guilty of a separate offense for each and every day during any portion of which any such person commits, continues, permits, or causes a violation thereof, and shall be penalized accordingly.

**XI-5-5.00 Public Nuisance**

Any use or condition caused or permitted to exist in violation of any of the provisions of this chapter shall be and is hereby declared a public nuisance and may be abated by the City pursuant to the procedures set forth in Chapter 500 of Title V of the Milpitas Municipal Code.

**XI-5-6.00 Civil Injunction**

The violation of any provision of this chapter shall be and is hereby declared to be a public nuisance contrary to the public interest and shall, and at the discretion of the City, create a cause of action for injunctive relief.

**SECTION 3. SEVERABILITY**

In the event any section or portion of this ordinance shall be determined invalid or unconstitutional, such section or portion shall be deemed severable and all other sections or portions hereof shall remain in full force and effect.

**SECTION 4. PUBLICATION AND EFFECTIVE DATE**

This Ordinance shall take effect thirty (30) days after adoption, and prior to the expiration of 15 days from the passage thereof shall be published at least once in the Milpitas Post, a newspaper of general circulation, published and circulated in the City of Milpitas, County of Santa Clara, thenceforth and thereafter the same shall be in full force and effect.



# MEMORANDUM

*Department of the City Attorney*



**To:** Honorable Mayor and Members of the City Council

**CC:** Tom Williams, City Manager  
Felix Reliford, Acting Planning Director  
Dennis Graham, Chief of Police  
Richard Pio Roda, Assistant City Attorney

**From:** Steven T. Mattas, City Attorney  
By: Peter Spoerl, Assistant City Attorney

**Subject:** Regulatory Options for Medical Marijuana Dispensaries

**Date:** May 9, 2007

At its regular meeting on May 15, 2007, the City Council will consider various regulatory options available to the City upon the expiration of the urgency ordinance, adopted August 2, 2005, that currently prohibits the establishment and operation of medical marijuana dispensaries within the City. The purpose of this memorandum is to provide the Council with a brief background of applicable state and federal laws in this area, and to provide a legal analysis of each possible regulatory approach.

## **Background**

On August 2, 2005, following previous discussion of the issue during meetings of May 17 and June 7, 2005, the City Council, by a unanimous vote of 5-0, adopted urgency Ordinance number 270, establishing a 45-day moratorium on the establishment and operation of medical marijuana dispensaries. On September 6, 2005, the City Council, by a vote of 4 to 1, voted to extend the initial moratorium for a period of 22 months and 15 days as permitted under state law. State law permits such moratoriums as a vehicle for Cities to study potential zoning measures to protect public safety, health and welfare, but under California Government Code section 65858(f), the moratorium may be extended only once. The current moratorium will expire on July 23, 2007. Thus, the Council should consider the information and regulatory options presented in this report and provide staff with direction as to how the Council would like to proceed.

## Discussion

In 1996, California voters enacted the Compassionate Use Act of 1996 ("the Act"), now codified in Health and Safety Code Section 11362.5.<sup>1</sup> The Act permits possession and cultivation of marijuana for limited medical treatment purposes, subject to certain procedural requirements of the Act. Therefore, a person who qualifies and complies with conditions set forth in the Act may legally possess and cultivate marijuana for medical treatment purposes. Stated another way, possession and cultivation of marijuana in full compliance with the Act is a legal activity under California law.

On January 1, 2004, SB 420, entitled the Medical Marijuana Program, now codified in Health and Safety Code Section 11362.7 et seq., went into effect and clarifies, and possibly expands, the scope of the Act. For instance, Section 11362.7(d)(2) allows a single individual to be a primary caregiver<sup>2</sup> to provide medical marijuana to an unlimited number of persons who are qualified patients<sup>3</sup> or persons with identification cards as long as every qualified patient or person with an identification card resides in the same city or county as the primary caregiver. Additionally, SB 420 allows a primary caregiver to receive compensation for "actual expenses" including reasonable compensation incurred for services provided to an eligible qualified patient or person with an identification card to enable that person to use marijuana and payment for out of pocket expenses incurred in providing services.<sup>4</sup>

### Medical Marijuana Dispensaries under State Law

The term "medical marijuana dispensary" is not defined by either the Act or the Medical Marijuana Program. However, medical marijuana dispensaries are generally understood by primary caregivers and advocacy groups relying on the statutory language quoted above as the designation for a facility to distribute and sell medical marijuana under the auspices of enabling state law. Although the term is not defined under state law, courts construing the section, while skeptical of large scale distribution facilities, have generally acknowledged that the law, as drafted, appears to contemplate the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of medical marijuana.<sup>5</sup>

While courts thus generally recognize medical marijuana dispensaries as potentially legal under state law, they are very careful to ensure that such facilities are not a pretext for the illegal distribution of marijuana to unqualified patients for strictly recreational purposes. In one case, a California

<sup>1</sup> All statutory references are to the Health and Safety Code Section unless otherwise noted.

<sup>2</sup> A "Primary Caregiver" is defined as "the individual, designated by a qualified patient or by a person with an identification card, who has consistently assumed responsibility for the housing, health, or safety of that patient or person." (Section 11362.7(d).)

<sup>3</sup> A "Qualified Patient" is a person who is entitled to use medical marijuana on the terms and conditions of the Compassionate Use Act, but does not have an identification card. (Section 11362.7(f).)

<sup>4</sup> Section 11362.765(c).

<sup>5</sup> People v. Urziceanu, (2005) 132 Cal.App.4<sup>th</sup> 747, 785.

Appellate Court determined that a defendant did not qualify as a "primary caregiver" for a large class of patrons of a cannabis club, noting that under the statute, a "primary caregiver" designated by the person who, or for whose benefit, marijuana is possessed or cultivated, must consistently assume responsibility for the housing, health or safety of that person.<sup>6</sup> The court expressed skepticism that the distributor and designated "primary caregiver" of the club actually maintained the specific clinical care-giving relationship required by the statute. Although the Court did confirm that a primary caregiver may serve more than one qualified patient, it made clear that in order to enjoy protection from prosecution, the relationship must be active and more than merely pretextual.<sup>7</sup> Similar decisions have upheld the prosecution of marijuana collectives where "primary caregivers" grow, stockpile and distribute marijuana to hundreds of qualified patients.<sup>8</sup>

Under the statute, the person providing medical marijuana may be the primary caregiver to an unlimited number of persons located in the same city or county, plus one person from outside of that city/county.<sup>9</sup> Thus, to have the benefit of the new law, the qualified patient or person with an identification card will want to identify a primary caregiver in the specific city or county in which the patient is located. This is why medical marijuana advocates desire that each city/county have its own dispensary (or dispensaries), and why residents of one city might be able to use a dispensary in a different city/county.

#### **Dispensaries under Federal Law**

Notwithstanding the Compassionate Use Act and the Medical Marijuana Program, federal law still prohibits the possession, cultivation, or distribution of marijuana and any such use is in violation of federal law. Thus, there are circumstances where the possession and cultivation of marijuana is a legally permitted activity under California law, but is a violation of the federal Controlled Substances Act ("CSA").<sup>10</sup> This is a fundamental tension that has yet to be resolved under either state or federal law. The Supreme Court has not addressed whether the Compassionate Use Act or any other state medical marijuana laws are preempted by federal law, though it has ruled that there is no "medical necessity" defense to marijuana possession under the CSA,<sup>11</sup> and has further ruled that Congress has authority to prosecute individual possession and cultivation of marijuana under the CSA despite state laws decriminalizing such possession.<sup>12</sup> In early 2005, federal drug enforcement

<sup>6</sup> People ex

agents conducted several raids of medical marijuana dispensaries in both Los Angeles and San Francisco and certain other Northern California cities.

Several recent actions and public statements by state and federal prosecutors have complicated the issue. In November of 2006, the District Attorney in Riverside County opined that the adoption of an ordinance allowing "storefront medical marijuana dispensaries" (which the DA concluded were no